

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** October 13, 2017

**Thru:** Bridget C. Bohac, Chief Clerk  
Richard A. Hyde, P.E., Executive Director

**From:** Steve Hagle, P.E., Deputy Director  
Office of Air

**Docket No.:** 2017-0867-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 114, Control of Air Pollution from Motor Vehicles  
SB 1731: Texas Emissions Reduction Plan (TERP) Programs  
Rule Project No. 2017-031-114-AI

**Background and reason(s) for the rulemaking:**

The TERP was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill (SB) 5, 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C, as the primary incentive program. In subsequent years, additional programs added to the TERP include the Drayage Truck Incentive Program (DTIP) under THSC, Chapter 386, Subchapter D - 1; the Texas Clean School Bus Program (TCSBP) under THSC, Chapter 390; the New Technology Implementation Grants Program under THSC, Chapter 391; the Texas Clean Fleet Program (TCFP) under THSC, Chapter 392; the Alternative Fueling Facilities Program (AFFP) under THSC, Chapter 393; and the Texas Natural Gas Vehicle Grant Program (TNGVGP) under THSC, Chapter 394. These additional programs were established to: replace drayage trucks operating at seaports and rail yards with newer, cleaner models; provide incentives to install retrofit devices on school buses to reduce exposure of school children to diesel exhaust; provide incentives for new technologies to reduce emissions from stationary sources; provide incentives to replace diesel vehicles with alternative fuel vehicles; provide incentives for the construction of fueling facilities to provide alternative fuel in nonattainment areas; and provide incentives to replace medium and heavy-duty vehicles with vehicles and engines powered by natural gas. The chapters in the THSC authorizing these programs and the TERP in general were scheduled to expire August 31, 2019.

In 2017, the 85th Texas Legislature enacted SB 1731, which extended the expiration dates of the TERP programs and revised some of the program criteria and processes. Instead of establishing a specific new expiration date, SB 1731 extended the programs until the last day of the state fiscal biennium during which the commission publishes in the *Texas Register* notification that the United States Environmental Protection Agency (EPA) has published in the *Federal Register* that areas in the state are designated attainment or unclassifiable/attainment for National Ambient Air Quality Standards for ozone, or the EPA has approved a redesignation substitute making a finding of attainment for the area,

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and judicial reviews of the EPA actions and rules have been completed and upheld the findings or the limitations period to seek judicial review has expired.

SB 1731 also amended the criteria and processes for several of the TERP programs. Major changes made under SB 1731 are explained below.

The DERIP criteria were amended to revise the definition of a small business and to specify that the small business incentives may be implemented through a separate small business grant program or as part of another grant program under Subchapter C. In addition, the requirement that the executive director shall waive certain eligibility requirements on a finding of good cause was changed to state that the executive director may waive the requirements.

The name of the DTIP under THSC, Chapter 386. Subchapter D - 1, was changed to the Seaport and Rail Yard Areas Emissions Reduction Program (SPRYP). Program criteria were added to include cargo handling equipment and to include repowers as an eligible project category. The requirements pertaining to the model year and nitrogen oxides emissions rate of the old and new vehicle and engine were also amended.

The criteria for the TCSBP were amended to add replacement of an existing school bus with a new school bus as an eligible project category. Other amendments were made to the program requirements.

The definition of the "clean transportation triangle" in THSC, §394.010, was removed and a definition of the "clean transportation zone" was added to THSC, §393.001. The new clean transportation zone includes additional counties that were not part of the previous clean transportation triangle. The references to the clean transportation triangle in the special provisions under the TCFP requirements in THSC, Chapter 392, pertaining to vehicles used for agricultural product transportation were amended to refer to the clean transportation zone.

The requirement under the TCFP that a grant application include the replacement of at least 20 vehicles was changed to require that at least 10 vehicles be included in the application. In addition, the provisions requiring that a vehicle qualifying for an incentive be certified to current federal emission standards was changed to require that the vehicle be certified to the appropriate current federal emissions standards as determined by the commission. The requirement that the executive director shall waive certain eligibility requirements on a finding of good cause was changed to state that the executive director may waive the requirements.

SB 1731 also removed the rulemaking requirements for the AFFP under THSC, Chapter 393, and the TNGVGP under THSC, Chapter 394. The rules for these programs only outline some, and not all, possible prioritization criteria for selecting projects under those programs and do not include the more detailed program implementation processes and criteria. Because the rules are no longer required and because the prioritization criteria in the rules provide only general information and not specific direction on implementation of these programs, the commission has determined that the rules are not

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needed in order to effectively implement the programs. Therefore, the commission proposes to repeal the AFFP program rules under §§114.660 - 14.662 and the TNGVGP rules under §§114.670 - 114.672.

This rulemaking is proposed to incorporate program changes made under SB 1731.

**Scope of the rulemaking:**

The proposed rulemaking would remove expiration language from the TCSBP and TCFP rules. The criteria and program requirements for the DERIP, DTIP, TCSBP, and TCFP would also be amended. In addition, the commission proposes to repeal the rules pertaining to the AFFP and TNGVGP.

**A.) Summary of what the rulemaking will do:**

The proposed rule revisions would revise Chapter 114, Subchapter K.

The proposed rulemaking would amend the DERIP rules under Subchapter K, Division 3, §§114.620, 114.622, and 114.623, as outlined below.

- The definition of a "small business" would be amended to change the requirement that in order to qualify as a small business a person may own no more than two vehicles, to require that a person own not more than five vehicles.
- The model year requirements for at least one of the diesel vehicles or equipment owned by a person would also be removed, as well as a change to require that a person have owned the diesel vehicle or equipment for at least two years, instead of the current one-year requirement.
- Clarifying language would be added specifying that the small business incentives may be implemented through a separate small business grant program or through special consideration to small businesses when implementing another program established under Division 3.
- The requirement that the executive director "shall" waive certain eligibility requirements on a finding of good cause would be changed to specify that the executive director "may" waive the eligibility requirements.

The proposed rulemaking would amend the TCSBP rules under Subchapter K, Division 4, §114.644, and would repeal §114.648, as outlined below.

- The commission proposes to add the phrase "during the school year" to the provision requiring that a school bus proposed for retrofit must be used on a regular daily route to and from a school, to clarify that the requirement only applies during the school year.
- The commission proposes to add more specific requirements for the school bus being purchased and the school bus being replaced. Under the proposed new requirements, the school bus being replaced would need to be a model year 2006 or earlier, have been owned and operated by the applicant for at least the preceding two years, be in good operating condition, and currently be used on a regular daily route to and from a school during the school year.
- The replacement school bus would need to be of the current model year or the year before the current model year, and the grant recipient would need to agree to

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- own and operate the bus on a regular, daily route to and from a school during the school year for at least five years.
- In addition, the school bus being replaced would need to be rendered permanently inoperable or permanently removed from the state to a destination outside of the United States, Canada, or the United Mexican States.
- The proposed rulemaking would repeal §114.648, which established an expiration date for Division 4.

The proposed rulemaking would amend the TCFP rules under Subchapter K, Division 5, §§114.650 - 114.653, and would repeal §114.658, as outlined below.

- The references to the "clean transportation triangle" would be amended to refer to the "clean transportation zone" and the reference to the statutory definition under THSC, §394.010, would be amended to refer to THSC, §393.001.
- The provision that an eligible entity that will replace 20 or more vehicles within a 12-month period with qualifying vehicles may apply for a grant would be changed to refer to replacement of 10 or more vehicles.
- The requirement that an application for a grant under the TCFP include replacement of at least 20 vehicles would be changed to require that an application include the replacement of at least 10 vehicles.
- The requirement that a qualifying purchase must be certified to current federal emissions standards would be changed to require that the purchase be certified to the appropriate current federal emissions standards as determined appropriate by the commission.
- The requirement that the executive director "shall" waive certain eligibility requirements on a finding of good cause would be changed to specify that the executive director "may" waive the eligibility requirements.
- The proposed rulemaking would repeal §114.658, which established an expiration date for Division 5.

The proposed rulemaking would repeal the AFFP rules under Subchapter K, Division 6, and the TNGVGP rules under Subchapter K, Division 7.

The proposed rulemaking would amend the DTIP rules under Subchapter K, Division, 8, §§114.680 - 114.682, as outlined below.

- The title of Division 8 would be changed from "Drayage Truck Incentive Program" to "Seaport and Rail Yard Areas Emissions Reduction Program." References in the rules would also be amended to refer to the new program title.
- The definition of "Cargo handling equipment" would be amended to insert the term "land-based" in the reference to equipment used at a seaport or rail yard.
- A definition of "Repower" would be added.
- The requirements that the replacement drayage truck have an engine of model year 2010 or later and the drayage truck being replaced have an engine of model year 2016 or earlier would be removed and new requirements pertaining to the old and new drayage truck or cargo handling equipment would be added, including a requirement that the engine on the replacement drayage truck or cargo handling

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equipment emit nitrogen oxides at a rate that is at least 25% less than the emissions rate of the engine on the truck or equipment being replaced.

- New requirements would be added for the engines or motors eligible for the repowering of a drayage truck or cargo handling equipment.
- New criteria would be added to specify that, unless otherwise determined by the commission, the nitrogen oxides emissions rate of the engines replaced or purchased under the program would be based on the emissions standard or family emissions limit of the engine or, for uncontrolled engines, a baseline emissions rate established by the commission.

**B.) Scope required by federal regulations or state statutes:**

The proposed rulemaking would incorporate program changes made by SB 1731.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

Staff does not recommend additional changes that are not part of implementing SB 1731.

**Statutory authority:**

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under THSC, Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, Chapter 386, which establishes the TERP; THSC, Chapter 386, Subchapter C, which establishes the DERIP; THSC, Chapter 386, Subchapter D - 1, which establishes the SPRYP; THSC, Chapter 390, which establishes the TCSBP; THSC, Chapter 392, which establishes the TCFP; THSC, Chapter 393, which establishes AAFP; and THSC, Chapter 394, which establishes the TNGVGP.

The amendments are proposed as part of the implementation of SB 1731, 85th Texas Legislature, 2017.

**Effect on the:**

**A.) Regulated community:**

The programs affected by this rulemaking are voluntary programs. The proposed rulemaking is not anticipated to have any implications on the regulated community.

**B.) Public:**

Persons who purchase or lease an eligible vehicle or equipment and who apply for an incentive would benefit from receiving the incentive.

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**C.) Agency programs:**

Program processes and materials would need to be updated.

**Stakeholder meetings:**

Stakeholder meetings were not held. However, a rulemaking public hearing will be held during the comment period.

**Potential controversial concerns and legislative interest:**

None are anticipated.

**Will this rulemaking affect any current policies or require development of new policies?**

The proposed rulemaking would not affect current policies. Updated program policies and procedures would need to be developed for each program.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

The DERIP could be implemented without immediate changes to the rules, although special consideration for small businesses could not be included in a DERIP grant program until the rules were amended.

The rules for the TCSBP, TCFP, and SPRYP would be inconsistent with the amended statutory provisions and the programs could not be implemented until the rules were amended.

The repeal of the rules for the AFFP and TNGVGP could be delayed or not considered without impacting the ability of the commission to implement those programs. The TNGVGP rules expired August 31, 2017, and the proposed rulemaking would simply remove the rules from the Texas Administrative Code (TAC). The rules for the AFFP will expire August 31, 2018. Not proceeding with the proposed rulemaking would just mean that the rule language would remain in the TAC, although the rules would no longer be in effect.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** November 1, 2017

**Anticipated *Texas Register* publication date:** November 17, 2017

**Anticipated public hearing date (if any):** December 11, 2017

**Anticipated public comment period:** November 17, 2017 - December 22, 2017

**Anticipated adoption date:** April 2018

**Agency contacts:**

Steve Dayton, Rule Project Manager, Air Quality Division, (512) 239-6824  
Sierra Redding, Staff Attorney, (512) 239-2496  
Derek Baxter, Agenda Coordinator, (512) 239-2613

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**Attachment:**  
SB 1731

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Erin Chancellor  
Stephen Tatum  
Jim Rizk  
Office of General Counsel  
Steve Dayton  
Derek Baxter  
Sierra Redding